

Magazine, Newspaper and Syndication Problems

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I HAVE BEEN ASKED to "lecture," and I emphasize that term, on copyright problems that arise in the cognate fields of magazines, newspapers and syndication. To deliver a lecture seems to imply that the lecturer* possesses some superior knowledge or wisdom of the subject in question not shared by his auditors. Since I lay claim to no such knowledge, let alone wisdom, especially vis-à-vis this audience, I should prefer to have what I am going to say considered more as a discussion or talk; not a lecture. Furthermore, although your presence is indicative of your interest in the topic under discussion, I am sure that your liking for lectures is unequal to that felt by some of our European friends, the Swiss for instance. The people of Zurich appear to be so attracted to lectures that it has been said of them that, if "required to make a choice between going to Heaven or going to a lecture about Heaven, they would hesitate only a moment." Well, fortunately, or unfortunately, such choice will not be yours tonight.

As lawyers, not only by training but by active practice, I assume that when we speak of the law in general, or of copyright law in particular, we mean primarily what Mr. Justice Holmes once called "the prophecies of what the courts will do in fact" and, as he

modestly added, "nothing more pretentious" than that. This historical and pragmatic rather than formal and logical approach to the law will not have the same appeal to those of our brethren of more philosophical bent. Nevertheless, I shall try to stay within the Holmesian framework of reasonably reliable prophecy about how the courts will resolve certain issues. However, I may, perforce, raise certain so-called twilight-zone questions about which safe prediction is more elusive.

For purpose of orientation and to arrive at an essential agreement on fundamentals, I think we should, at the outset, consider certain basic aspects of copyright. What I propose is a passing and general, rather than an exhaustive, consideration of such aspects, without regard for the niceties and refinements that a more scholarly approach would require. I ask your leave to do this because it should make more intelligible our later discussion of particular copyright problems in relation to magazines, newspapers and syndicates. After all, it is only in certain limited respects that those particular problems differ from the ones that confront other creators or users of protected matter.

Historically and logically we begin with the common law's traditional recognition of property, literary property as it is sometimes called, in unpublished literary material. Literary material should be understood as a broad and inclusive category, one embracing all works of authorship, literary or otherwise, reduced to concrete form. The works included may be of many sorts, such as stories, poems, lectures, paintings, pictures, statues, dramas and musical compositions. To put it another way, what the common law (and the statute for that matter) will protect is an "original collocation of visible and audible points—of lines, colors, sounds or words," expressed in some definite and relatively durable fashion. Just what is meant by "original," in that context, will be seen later when we discuss copyrightable subject matter under the Copyright Act itself. Suffice it for our purposes at this juncture, to say there must be such original expression, ordering or sequence of visible or audible points.

The right that the common law accords to the author or proprietor of such a work is one of exclusive control over the work, that is, the right to prevent, and to recover damages and profits for, the unconsented-to copying (directly or indirectly), publishing or otherwise using of the work, or of any not insignificant part of it, unless and until it is first generally published with authorization. Once the work is generally published, by the author or proprietor of it or with his authority, there is an instantaneous and complete

divestment of the common-law property in the work. Such publication and the rights at common law are mutually exclusive.

The Copyright Act has not impaired the common-law right in unpublished works. In fact, section 2 of the Act expressly negates impairment and inferentially supports such right.

So much for our preliminary and passing reference to the common-law sanction.

Since 1790 we have had copyright statutes—legislation of the Congress of the United States on the subject of copyright. The power of Congress to legislate in this sphere stems from Article 1, Section 8, of the Constitution wherein Congress is empowered “to promote the progress of science and the useful arts by securing for limited times to authors . . . the exclusive right to their . . . writings. . . .”

Under the Act, the work must have some element of authorship, that is to say, it must be original, and it must be memorialized in some way as a writing. Here, as at common law, writing is a broadly encompassing term; a writing need not be expressed in verbal symbols but may be manifested by musical notation, or by shape, line, color, picture, and so forth. Section 4 of the Act supports a comprehensive meaning of the term “writings” for copyright purposes by stating that copyrightable works “include all the writings of an author.”

What makes a work copyrightable? Is any degree of literary or artistic excellence required? What makes a work original, since originality is indispensable to, and fixes the dimensions of, copyrightability? These are indeed critical questions. Only what is capable of being copyrighted in a work will be protected by the copyright secured on it. However, a very modest, or even low degree of artistic quality or merit, one so low as almost to reach the vanishing point, is all that is needed to make a work copyrightable, so long it be original with the author.

To be original with the author, all that is required is that the work owe “‘its origin’ to the ‘author’”¹; that it be the author’s own work and not actually copied from another or from the public domain. It will be noted that under so circumscribed a definition of originality, a work independently conceived by the author and therefore copyrightable may be identical with other copyrighted works or with works in the public domain.² Such identity will not deprive it of copyright status. This is a corollary of the doctrine of parallelism or independent creation that inheres in the law of copyright.

¹ *Alfred Bell & Co. Ltd. v. Catalda Fine Arts*, 191 F. 2d 99, 102.

² *Fisher (Inc.) v. Dillingham et al.*, 298 F. 145.

By virtue of the foregoing, originality for copyright purposes may be, but need not necessarily be, more of a plodding than of a coruscating sort, and as such within reach of artistic mediocrity or less. The house of copyrightability is indeed spacious: Not only will it accommodate "the lines of the poet or the historian's period"³ and such works as possess that "perfect blending of form and substance" which Joseph Conrad, so painstakingly and with such a "complete and unswerving devotion" strove to achieve "in the shape and ring of sentences,"⁴ but also directories,⁵ circus posters,⁶ "the kind of treacle that passes in a popular love song,"⁷ "the grotesque and ludicrous Spark Plug cartoon,"⁸ the "foolish"⁹ or "silly"¹⁰ Wonderman or Superman comic pictures, and even deliberately crude malapropisms.¹¹ This polarity is intended merely to illustrate the contrast and to show the breadth, but not the details, of the gamut. My point is that the courts have wisely refrained from making their own value judgments in this field. Such self-restraint was manifested by Mr. Justice Holmes when he once said that "the taste of any public is not to be treated with contempt."¹²

Not only is the house of copyrightability spacious, but it also seems that one may dwell therein fortuitously and effortlessly: One may accidentally and by a sheer stroke of luck "create" something copyrightable and then "adopt" it as one's own.¹³

Even in the Second Circuit, which has gone so far in narrowing the concept of originality, the author must show that what he claims as his independent creation or contribution is not "merely trivial" but is at least distinguishable and recognizable as his own.¹⁴ It would seem, however, that the Seventh Circuit applies a more exacting standard in that only a *material* revision of previously copyrighted work will engender a new copyright.¹⁵

Protectible subject matter will consist of "the distinctive unfolding" of ideas,¹⁶ of the author's expression or embodiment of them, but not of ideas,¹⁷ facts or errors of fact,¹⁸ or commonplace words, phrases or idioms¹⁹ themselves.

³ Baker v. Selden, 101 U. S. 841, 842.

⁴ "Conrad Argosy," p. 82.

⁵ 17 U.S.C.A. 5 (a) and maps as well under (f).

⁶ Bleistein v. Donaldson Lithographing Co., 188 U. S. 239.

⁷ Arnstein v. Marks Music Corp., 82 F. 2d 275.

⁸ King Features Syndicate v. Fleischer, 299 F. 533.

⁹ Detective Comics Inc. v. Bruns Productions, 111 F. 2d 432.

¹⁰ National Comics Publications v. Fawcett Publications, 191 F. 2d 594.

¹¹ Hoffman v. Le Traunik, 209 F. 375.

¹² Bleistein v. Donaldson Lithographing Co., 188 U. S. 239, 252.

¹³ Alfred Bell & Co. Ltd. v. Catalda Fine Arts, 191 F. 2d 99, 105.

¹⁴ Gerlach-Barklow v. Morris & Bendlen, 23 F. 2d 159; National Comics Publications v. Fawcett Publications, 191 F. 2d 594, 600.

¹⁵ Adventures in Good Eating Inc. v. Best Places, etc., 131 F. 2d 809.

¹⁶ Yankwich, Leon R., on "Originality in the Law of Intellectual Property," 11 F. R. D. 458.

¹⁷ Nutt v. National Institute, Inc., 31 F. 2d 236; National Comics v. Fawcett, 191 F. 2d 600.

¹⁸ Oxford Book Co. v. College Entrance Book, 98 F. 2d 688, 691.

¹⁹ Park v. Warner, 8 Fed. Supp. 37.

Copyright is secured "by the act of the person claiming the privilege".²⁰ It vests upon "publication" of the work with due notice of copyright.²¹ It is preserved by the proper placing of such notice of copyright on all copies of the work "published or offered for sale in the United States by the authority of the copyright proprietor".²²

Copyright under the Act is made up of a specific bundle of exclusive rights provided for therein. The most basic of such rights is the exclusive right to copy all of the copyrightable material parts of the protected work. This right attaches to all works published under section 10 of the Act as well as to those particular types of unpublished works which may be registered under section 12 thereof.

The Copyright Act contains relatively few provisions which are specifically applicable to magazines or newspapers. Section 3 pertains to composite works and periodicals and provides that "all the copyrightable component parts" of them shall be protected by the copyright secured on them; it further provides that the copyright to the composites or periodicals shall accord "to the proprietor thereof all the rights in respect thereto which he would have if each part were individually copyrighted . . ."²³ Section 5, in its non-exhaustive classification of copyrightable works, lists in subdivision (b) "periodicals, including newspapers." Section 16 deals with the manufacturing provisions relative to printed books or periodicals. Parenthetically, I submit that the requirement of manufacturing in the United States, under the former wording of that section, applied to all periodicals, whether the original text thereof was in English or not.²⁴ Section 19 deals with the important notice provisions of the Act, and although not singled out, magazines and newspapers would generally come under the rubric of "printed literary" works requiring the longest form of statutory copyright notice. Section 20 deals, among other things, with periodicals and provides that the copyright notice for them must appear on "the title page or upon the first page of the text . . . or under the title heading". Section 25 gives newspapers a privileged position for an infringing reproduction of a photograph in that the "in lieu of" damage clause limits liability therefor to not more than \$200.00 nor

²⁰ *Eggers v. Sun Sales Corp.*, 263 F. 373.

²¹ *The Washingtonian Pub. Co., Inc. v. Pearson et al.*, 306 U. S. 30.

²² 17 U.S.C.A. 10.

²³ 17 U.S.C.A.; *New Fiction Pub. Co. v. Star Co.*, 220 F. 994, 997 case shows that this section means that discrete parts, such as chapters, stories, novels, etc. in

the magazine need not carry specific notices of copyright. The section does not cover the question of rights to those parts.

²⁴ Accord, 2 Ladas, "International Protection of Literary, etc. Property," p. 765; but, see De Wolf, "An Outline of Copyright Law," p. 175.

less than \$50.00. This privilege has been held to apply only to newspapers and not to other periodicals such as magazines.²⁵

Perhaps the two most serious problems that arise for magazines in this area involve the purchase of rights to literary or artistic material and the notice of copyright to be affixed when the material is published in the magazine. In so far as purchase is concerned, the problem is one of legal draftsmanship more than anything else: What has been said or left unsaid in the contract between the publisher on the one hand, and the author or his literary agent, on the other. The nature of the relationship between those parties, spelled out by such contract, may profoundly affect the validity of the copyright notice used on the author's work or on the magazine containing it. The propriety of such notice may determine whether the work, once so published, will continue under copyright or escape into the public domain.

When all rights to a literary work are acquired, there is no problem. If a publisher buys the author's work for a certain sum and nothing more is said on the matter by the parties, or if no rights are expressly or by necessary implication reserved to the author, then the transaction will be considered an outright sale with right to copyright passing to the publisher.²⁶

However, from my experience, the prevailing practice of the trade is that only limited rights, such as all or certain serial rights, or all periodical publishing rights, are the ones generally granted. We have counseled our publisher clients to avoid, whenever possible, the use of the term "serial rights" and what is worse, the term "first" or "second serial rights" because of what we believe to be the inherent ambiguities of such terms. In the *New Fiction Publishing*²⁷ case the term "all serial rights" was considered as having "a definite meaning among publishers" and was therein taken to mean "all publishing rights, including magazine and newspaper publishing rights and excepting only book, dramatic and motion picture scenario rights." But that case is not necessarily authoritative since the definition of "all serial rights" was not put in issue.

In any event, when the parties bargain for first or second serial rights to a work and they fail to amplify such rights, as is not infrequently the case, the uncertain nature of the transaction is drawn into sharp focus. Do "first serial rights" indicate the medium, so that the work is publishable only in magazines as distinguished from newspapers; or do such rights mean first publication of the work irrespective of medium,

²⁵ *Cory v. Physical Culture Hotel, Inc.*, 14 Fed. Supp. 977. There is also a reference to periodicals in 17 U.S.C.A. 24, wherein copyright proprietors thereof may, under certain circumstances, renew and extend copyright.

²⁶ *Dam v. Kirk La Shelle*, 175 F. 902. Moreover, where all rights are transferred no authorship credit need be given: *Vargas v. Esquire Inc.*, 164 F. 2d 522.

²⁷ *New Fiction Pub. Co. v. Star Co.*, 220 F. 994, 995.

so that upon the completion of initial publication there is no further right to republish? Do so-called "second serial rights" presuppose a prior publication in a magazine or in a book, or are such rights indicative of newspaper publishing rights regardless of prior or subsequent publication in any other medium? Moreover, does the word "serial" in this context necessarily imply that the work must be published in instalments, or is it neutral in that regard, so that the work may be published as a so-called "one-shot"? Another question that recurs is whether the work may be reprinted by the publisher in pamphlet or booklet form. For my own part, I think first serial rights refer merely to magazines and second serial rights to newspapers and so long as one stays within those respective media the work may be published and republished either in instalments or not. Of course, these questions arise only when the agreement between the parties is silent on the subject. As such, they are remediable deficiencies that might have been obviated had the parties expressly or by necessary implication spoken on the point. Not infrequently the parties deal so meagerly with this important question of the scope of rights that no more than a short abbreviated legend or notation will be found on the face or back of the publisher's payment check or on the detachable voucher accompanying it. This seems strange indeed, since the parties involved are men whose business it is to deal in words—editors and authors. Yet, I have frequently found them reluctant to formalize or even to say out in reasonable detail just what rights are involved.

If only serial rights or periodical publishing rights to a theretofore unpublished literary work have been acquired, admitting sufficient amplification of the ambit of those rights, it will be held that a license rather than an assignment has been granted by the author to the magazine publisher.²⁸ The transaction would be a sale, in a tax sense, as the *Wodehouse* case²⁹ shows, but in a copyright sense, under *New Fiction* and *Public Ledger* cases, it would be a mere license as distinguished from an assignment because of the restricted nature of the grant. As a corollary, the general or blanket copyright to the magazine secured in the publisher's name will not, without more specific permission or instruction from the author, suffice to copyright the particular work.³⁰ However, even though a license, if there is authority, express or implied in fact, from the author to the publisher to secure copyright in the publisher's name,³¹ the publisher's copyright will protect the work with the consequence that it will not fall into the public domain.

²⁸ 220 Fed. 996; *Public Ledger v. New York Times et al.*, 275 F. 562. As a license, the right generally may not be transferred or sublicensed by licensee, absent authority so to do: Well, "Law of Copyright," p. 549. See also Kupferman, "Renewal of Copyright," 44 *Columbia Law Review*, 712 at fn. 18.

²⁹ *Commissioner of Internal Revenue v. Wodehouse*, 337 U. S. 369.

³⁰ *Mifflin v. White*, 190 U. S. 260.

³¹ 190 U. S. 260; Well, "Law of Copyright," p. 320; *Quinn-Brown Pub. Corp. v. Chilton Co., Inc.*, 15 Fed. Supp. 213; *Bisel v. Ladner*, 1 F. 2d 436.

The old but leading case of *Mifflin v. White*³² is not in conflict with the last-mentioned rule, but rather supports it. In that case the court failed to find, as a fact, the necessary authority. Cases such as *Mail Express Co. v. Life Pub. Co.*,³³ *Public Ledger v. Post Printing & Pub. Co.*³⁴ and *Egner et al. v. Schirmer*³⁵ do not, I submit, hold to the contrary. In those cases the indispensably necessary authority was either absent or negated. However, under the authority of the last cited cases, absent such authority, the publisher's general copyright will not cover the particular work; and, since initial publication of the work in the magazine has been authorized by the author, the work will be deemed "dedicated" to the public, or to put it more precisely, there will be a forfeiture of copyright.

The problem that we have been considering first arose as the result of treating copyright as something "solid and indivisible"³⁶ so that only all of it could be assigned. Was the grant an assignment or mere license? Such inquiry involved more than logomachy because, under section 9 of the Act, only "the author or proprietor of any work . . . or [his] assigns, shall have copyright for such work". Later, the courts recognized that one could be an assignee or a proprietor, as those words were deemed equivalent, if one acquired from the author the rights provided for in at least one of the statutory divisions of section 1³⁷ of the Act; in other words, if the rights granted were not further subdivided than the way in which the statute had divided them. Another attack upon indivisibility, but of a different sort, had also come with the enactment of section 3 of the Act which allows a blanket copyright on a composite or periodical to embrace separate copyrights on the distinct component parts.³⁸ Furthermore, equity intervened to protect an exclusive licensee if his particular right had been invaded; such licensee, though not an author or proprietor, could compel the author or proprietor of the copyright to the work to join in an action against the infringer of the licensee's right, thereby satisfying the procedural requirement of section 101 of the Act relative to infringement actions.³⁹ Although copyright is no longer the solid and unitary entity it was originally conceived to be, nevertheless, the statute does require proprietorship and such status is more than licenseeship.

Let us leave for a moment literary works and consider artistic and pictorial ones, such as paintings, drawings and photographs, commissioned by the magazine for reproduction on the cover or inside the magazine. In this case the work of art or photograph will, we may assume, be

³² This hard case entailed, due to defective notice in licensee-publisher's name, loss of copyright to Dr. O. W. Holmes' "Professor at the Breakfast Table."

³³ 192 F. 899.

³⁴ 294 F. 430.

³⁵ 139 F. 2d 398.

³⁶ *Kaplan v. Fox Film Corp.*, 19 Fed.

Supp. 780, 781; *New Fiction Pub. Co. v. Star Co.*, 220 F. 994, 997.

³⁷ *Public Ledger v. New York Times*, 275 F. 562.

³⁸ 17 U.S.C.A.; *Kaplan v. Fox Film*, 19 Fed. Supp. 780, 781.

³⁹ *Independent Wireless Tel. Co. v. Radlo Corp. of America*, 269 U. S. 459.

original in a copyright sense and will be first authoritatively published in the magazine. As to rights: Usually a magazine will purchase all reproduction rights to the work of art or photograph. If, however, the work is created for the magazine and the artist or photographer is paid for his artistic skill, time and materials, then, I submit, all rights, including copyright, will pass to the magazine as purchaser, including the original or negative.⁴⁰ If only reproduction rights are acquired then no rights to the original or negative, except for the purpose of reproduction, will pass. This is not unusual because the right to reproduce or copy is distinct from the tangible object and the transfer of the right to the one does not in itself carry with it the other, as section 27 of the Act expressly provides. Subdivisions (h) and (j) of section 5 make reproductions of works of art and photographs, respectively, copyrightable subject matter. If the reproduction rights have been granted to the uncopyrighted work of art or photograph, the work or photograph as first reproduced in and by the magazine may be validly copyrighted by the publisher. If only limited rights have been transferred, such as a right to copy once, then only a license has been granted with the same attendant problems relative to copyright notice as in the case of literary works.

Let us now consider a different case, one that occasionally occurs. Suppose a copyrighted literary work, in the form of a poem, short story, novel or article is to appear in a magazine. By hypothesis, the work has already been published under the Act, and copyright to it secured in the author's or proprietor's name. What copyright notice is needed to protect this work upon its republication in the magazine? It would be patently correct to run the same specific notice on the work that it carried when first published. However, the magazine may be averse to imprinting such specific notice on the republished work. Under what circumstances will the magazine's general notice preserve the copyright to this work, even though only a license to republish it has been granted? If the magazine contains hitherto unpublished, copyrightable matter of a material or at least distinguishable nature which belongs to the publisher, such "new matter" in the magazine will make it a new work under section 7 of the Act and one general copyright notice in the publisher's name as the proprietor of the new work should suffice. Parenthetically, since section 7 also allows copyright on original compilations of public domain and copyrighted works, there should be the same result if the magazine is such compilation. A magazine such as *Encore* would seem to fit that description.

However, quite a different situation develops when the original of a work of art is copyrighted by registration, as distinguished from publica-

⁴⁰ *Altman v. New Haven Union Co.*, 254 F. 113; *Lumiere v. Robertson-Cole Distributing Corp.*, 280 F. 550.

tion, under section 12 of the Act, and its first reproduction in a magazine is licensed by the artist. If the magazine is authorized to reproduce the work only once, as happened in the *Leigh* cases,⁴¹ then unless the magazine reproduction carries the author's own specific copyright notice, the reproduction will probably pass into the public domain, although the copyright on the original work of art will not necessarily be forfeited.⁴² The "new work" provision of section 7 apparently will not aid the artist in this type of case because the reproduction is not a republication, inasmuch as the work of art had not been previously published.

The foregoing analysis of the notice problems applies to newspapers as well as magazines.

To obviate such problems when only limited publishing rights are involved, I suggest that the contract between the author and publisher provide, in the first instance, for the assignment of all rights from the author to the publisher with a promise on the publisher's part to reassign to the author, within a reasonable time after publication, the copyright that the publisher has secured to the author's work. Such reassignment will generally reserve to the publisher such rights as survive initial publication. Despite the circuitry of this arrangement I would recommend it because it should, additionally, protect a publisher against a subsequent grant by the author of the same or conflicting rights. If such roundabout method is not followed, then the contract should at least contain an express authorization by the author to the publisher to secure copyright to the work in the latter's name. Copyright so secured will be impressed with a trust to the extent of the author's ungranted rights. In passing, it should be observed that when copyright is secured in the publisher's name, the author takes a risk that the publisher may breach his trust and convey to a bona fide purchaser rights beyond those granted in the first instance.⁴³

Whether the contract between author and publisher expressly provides for the assignment of copyright to the author or not, if there is an important residue of rights that belongs to the author, the court will compel an assignment under the trust relation. Many authors who have granted only restricted publishing rights request such assignments from publishers after initial magazine publication; and publishers, recognizing the obligation, generally deliver such assignments as a matter of course. Usually assignments in these circumstances will except and reserve to the publisher only such of the granted rights to the work as outlive first publication.

Another problem that has come up in connection with magazines turns on whether copyrightable material on magazine covers will be pro-

⁴¹ *Leigh v. Gerber*, 86 Fed. Supp. 320; *Leigh v. Barnhart*, 96 Fed. Supp. 194.

⁴² *Leigh v. Barnhart*, 96 Fed. Supp. 194.

⁴³ *Brady v. Reliance Motion Picture Corp.*, 229 F. 137.

tected in the absence of a copyright notice on the cover itself. The *Eliot Publishing* case⁴⁴ involved the cover of a comic magazine and held that the copyright on the magazine as a whole did not necessarily include the cover. Such holding, I submit, was incorrect since the bound-in cover, especially on a comic magazine, is an integral component of the periodical and under section 3 should be caught by the general copyright on the periodical. The *Kaplan* case⁴⁵ points that way. Moreover, the recent *Condé Nast*⁴⁶ decision holds that, although art work on the cover is entitled to copyright in its own right as a reproduction, it will be protected by the general copyright on the entire magazine if the art work of the cover is related in some way to the text of the magazine.

The customary method of securing copyright to a magazine or newspaper is the publisher's "taking copyright on the entire periodical,"⁴⁷ and such copyright will cover all copyrightable contributions as components, if the authority therefor from the author of the contribution is found. Of course, if the copyright on the whole has not been duly acquired, then, absent specific notice on the contribution, there will be no copyright to the contribution. A good copyright on the whole periodical is secured in only one way; it must be published, in a copyright sense, with the statutory notice properly placed on all copies first published or offered for sale with authorization. This is not an easy concept, especially for laymen, to comprehend. The thought persists, and laymen are not alone in this regard, that some act of some governmental agency is needed to initiate copyright. However, under the *Washingtonian* case⁴⁸ even the statutory provision calling for prompt deposit and application for registration, which under the statutory scheme are to follow the acquisition of copyright, need not take place promptly and may be deferred until an infringement action is to be commenced or the Register of Copyrights demands deposit under section 14 of the Act.⁴⁹

Publication sufficient to initiate copyright may be in the form of an outright sale of a single copy,⁵⁰ and, since the copyright law does not frown upon merely colorable sales,⁵¹ the sale needed for such purpose should not be difficult to spell out.

⁴⁴ *Fawcett Publications v. Elliot Publishing*, 46 Fed. Supp. 717.

⁴⁵ *Kaplan v. Fox Film Corp.*, 19 Fed. Supp. 780, 781.

⁴⁶ *Condé Nast Publications, Inc. v. Vogue School*, 94 U.S.P.Q. 101, 106.

⁴⁷ *Kaplan v. Fox Film Corp.*, 19 Fed. Supp. 780, 781.

⁴⁸ *Washingtonian Pub. Co. Inc. v. Pearson et al.*, 306 U. S. 30.

⁴⁹ Whether the Register may demand not only the deposit of copies but also the application for registration with accompanying fee therefor is not completely clear from this section. It is believed that the application and fee may properly be demanded. See also, *Kling Features Syn-*

dicate v. Bouve, Register, 48 U.S.P.Q. 237, wherein "page proofs," bound into a book with due copyright notice thereon and "published" as such had to be accepted by the Register under then Sections 12 and 13 of the Act; if deposits and application are in *apparent compliance* with the Act, Register has no power to reject them since his functions are ministerial.

⁵⁰ *Stern v. Remick*, 175 F. 282; *Mittenhal Inc. v. Irving Berlin Inc. et al.*, 291 F. 714; Weil, "Law of Copyright," pp. 124, 127; De Wolf, "An Outline of Copyright Law," p. 29.

⁵¹ *Atlantic Monthly Co. v. Post Publishing Co.*, 27 F. 2d 556.

The form of the copyright notice prescribed by the Act for magazines or newspapers will generally be the one required for "printed literary" works, that is, the one requiring the date of first authorized publication. However, it is the content or nature of the work that will be determinative, since the grouping of unconnected drawings without story or continuity even though printed and published in book form has been held not to be a literary work.⁵²

Even if newspapers contained no special literary features, such as editorials, reviews, by-line columns, gossip or chitchat, and were limited to news articles that were not mere chronicles or recitals of fact or purported fact, the newspapers would, nonetheless, be copyrightable as literary works. While news as such, or to speak more precisely, the information, fact or purported fact of which news is compounded, is not subject to copyright, news articles having some literary quality in their expression are copyrightable, and when copyrighted will be protected in their expression.⁵³

It is imperative that the prescriptions of the Act relative to the content of the notice be satisfied, at least in all substantial respects. In the *Mifflin* case,⁵⁴ the court said: "It is incorrect to say that any form of notice is good which calls attention to the person of whom inquiry can be made and information obtained, since the right being purely statutory the public may justly demand that the person claiming a monopoly of publication shall pursue in substance at least the statutory method of securing it."

The decisional trend, at least in the Second Circuit, has been to liberalize the requirements of the Act relative to the form or content of the notice.⁵⁵ Contrariwise, the Eighth Circuit will not tolerate any substantial deviation from the statutory requirements.⁵⁶

The placing of the notice is highly important and should be considered *pari passu* with its content. The notice may be, though it need not be, placed on the title page of the magazine or newspaper. It is generally imprinted there. The title page has been judicially defined as the "one particular page devoted, in whole or in part, especially to the title," and "should be one that is readily found without examining every page in the work. . . . Usually the title page is looked for near the beginning of the work."⁵⁷ Such title page is usually the table-of-contents page of the magazine. It is not thereby any the less a title page, so long as the title prominently appears on it. Such page may permissibly be preceded by relatively few pages, since it need only be "near the beginning of the work." The notice may, with propriety, be placed on the first page of text

⁵² *Fleischer Studios Inc. v. Freundlich*, 73 F. 2d 276.

⁵³ *Chicago Record-Herald v. Tribune Assn.*, 275 F. 797.

⁵⁴ *Mifflin v. White*, 190 U. S. 264.

⁵⁵ See *National Comics Publications case*, 191 F. 2d 602, where it is said: ". . . We hold that any notice is sufficient which

gives the substance of what is prescribed in Section 19' of the Act; see also *Shapiro Bernstein & Co., Inc. v. Jerry Vogel Music Co., Inc.*, 161 F. 2d 406.

⁵⁶ *Booth v. Haggard*, 184 F. 2d 470.

⁵⁷ *Freeman v. The Trade Register*, 173 F. 419.

or under the title heading. If the first page of text is used, non-textual, or even advertising, pages may precede it. If the title heading is used, then the notice should be juxtaposed beneath such heading. Newspapers usually place their blanket notices directly under the title heading at the top of page 1 of the issue.

The courts have held that the proper placing of the notice is mandatory under the Act, with the consequence "that a notice on any other page, no matter how prominent, is ineffective."⁵⁸

It may be asked, why are so many newspapers uncopyrighted? Well, in the first place, the syndicated comics and special features published in the newspapers carry their own specific notices in the syndicate's name. But how about the other unsyndicated components, such as articles or columns, editorials, political cartoons, and photographs, that belong to the newspaper and could be copyrighted as such? It is quite true that these items, which could repose safely under copyright, are lost for that purpose by publication without copyright notice. I think one possible explanation is that strict news reports and editorials, whether verbal or cartoon, which bulk so large in newspapers, are of only current interest, and their relative evanescence "spills over," affecting the publisher's evaluation of the other more durable items. Another contributing cause, I believe, is the prevalent misapprehension that copyright requires antecedent deposit and registration, procedures considered cumbersome in view of newspaper deadlines. Still a further reason derives from this question: When a newspaper is published in several editions each day and each edition contains some distinguishable copyrightable matter under the not "too trivial" test, must (or merely may) each edition constitute a new work for copyright purposes? If a plurality of copyrights must arise, willy-nilly, by virtue of a general copyright notice appearing on all editions, may not the Register of Copyrights demand deposit and application for registration of each such edition as a work for which separate copyright has been claimed and, also, will not compliance with such demand subject the publisher to prohibitive costs by way of copyright fees?⁵⁹ I understand from the present Register of Copyrights, with whom I have discussed this matter, that it is not his intention to take such an extreme, and perhaps untenable, position. Furthermore, the Register has suggested that, by means of a certain disclaimer in the copyright notice itself, such plurality of daily copyrights could be avoided. I incline to the view that such disclaimer would be effective, although I find no statutory authorization for it.

In my opinion, no discussion of magazine or newspaper copyright problems could even approach adequacy without some consideration of the

⁵⁸ *Kraft v. Cohen*, 117 F. 2d 579; *Richards Inc. v. New York Post Inc.*, 23 Fed. Supp. 619.

⁵⁹ Query: Are not separate daily editions of the same newspapers published on the

same day sufficiently analogous to "several volumes of the same book published . . . at the same time" to come within the proviso of section 215 of the Act if deposited at the same time?

important *De Acosta* case.⁶⁰ Although especially meaningful for magazines and newspapers, the issues in that case and their resolution transcend those media and have a compelling importance to all creators and users of literary material. In that case the court had before it an unpublished and uncopyrighted work written by the plaintiff. Under the rationale of the case, its common-law aspect played no part except to the extent that "fair use" did not avail, despite its urging.

Mercedes De Acosta, the plaintiff, had written an original screen play stated by her to have been based on the life of Clara Barton, of Red Cross-founding fame. In that play there was a letter, purportedly authentic, to Clara Barton from her brother wherein he pathetically announced the sudden death of, and gift from, one Tom Maxwell, who, silently and from afar, had been in love with Miss Barton. One of the defendants in the case, Beth Brown, a writer of good reputation and competence in the magazine field, had written a biography of Clara Barton. Another defendant, *Cosmopolitan Magazine*, had purchased from Miss Brown all serial rights to the latter's biography, buying those rights through a reputable literary agent in the open literary market and only after assurances had been given that Miss Brown had done exhaustive research and had intended to write an accurate biography of Clara Barton. Well, substantially the same letter that had appeared in plaintiff's play found its way into Miss Brown's biography. *Cosmopolitan* innocently published it as part of its digest of the biography. *Cosmopolitan* had thought the letter in question an accurate piece of Bartoniana. However, it developed that that letter had no historicity, that it had been fabricated by the plaintiff, although one reading the plaintiff's play could reasonably have taken the letter to be fact rather than fiction. It had verisimilitude. Miss Brown's access to the play was shown at the trial. The trial court found as a fact that *Cosmopolitan* had been entirely innocent; it had had no notice whatsoever of plaintiff's work nor could it have searched for it anywhere; it had had no reason for believing that the letter in Miss Brown's biography had been taken from the plaintiff's play. In fact, *Cosmopolitan* did not know that it was copying a copy, but assumed it was copying an original. Despite the foregoing, liability for damages and profits was imposed. The far-reaching import of this case, which makes a publisher answerable in damages for the *innocent indirect copying* of any not insignificant part of an unpublished work, is incisively stated in the dissenting opinion of that distinguished jurist, Judge Learned Hand. In Judge Hand's opinion, at page 413 of the report, he said:

. . . He [the publisher] becomes unconditionally liable, who copies the copy of a copy, . . . and so on; no matter how far we must go to reach the eventual author. When one considers that for infringement it is not necessary to reproduce the work in *ipsissimis verbis*; but that it is enough to take the

⁶⁰ *De Acosta v. Brown et al.*, 146 F. 2d 408, cert. denied, 325 U. S. 862.

substance of its "expression," as distinct from its "ideas," the resulting liability becomes unique in severity, and one against which no degree of care will forfend. That it may prove, as I have suggested, an appreciable incubus upon the freedom of the press, appears to me by no means far-fetched.

Before leaving this subject I ask that you consider a similar though distinguishable problem. Let us posit the following facts: An author writes and *publishes* under copyright either an actual biography of a well-known person, or an actual interview with a public figure; such work contains what are held out to be the actual words of the subject of the biography or of the public figure; the words in question, despite the quotation marks surrounding them, are, however, entirely or substantially original with the writer rather than with the subject of the biography or the public figure; certain significant portions of those words are then copied into another work on the same subject (a later biography or interview) under the induced and reasonable, though mistaken, belief that they were the actual words of the person or figure who purportedly uttered them. I submit that estoppel or fair use should bar recovery in such case.

Let us move into the field of newspaper syndication: A syndicate is primarily a producer and distributor of literary and artistic material for newspaper publication. A syndicate's strength and usefulness lie in its capacity to volume- or mass-distribute such material at reasonable cost to each of its newspaper customers. It makes accessible to small-town or village newspapers, because within their ability to pay, what would otherwise be available only to the economically more powerful, large, metropolitan dailies. The big newspaper and small one get the same quality of material. Prices may range from a low of a few dollars to a few hundred dollars per week for the same feature.

Our firm represents a very large syndicate. Our client licenses, or, as the trade would say, "sells" to, "more than 2,500 papers published in 32 languages in more than 90 countries." It distributes one comic strip alone, "Blondie" by name, to approximately 1,250 newspapers. It services newspapers with cartoons, strips, comic pages, news pictures, editorial cartoons, columns, special articles, educational and entertainment features, fiction, non-fiction and pattern services. In addition, it licenses three-dimensional reproductions of its cartoon characters. I mention those activities merely to show the broad scope of but one syndicate's operations.

Chief among a syndicate's repertory will generally be so-called comics in the form of single panel cartoons, comic strips and Sunday comic pages. How comics are developed editorially is not within our concern or my competence. Moreover, the photographing and mechanical skills, such as etching and engraving, involved in the processing of comics for newspaper reproduction are too intricate to be discussed here. Suffice it to say that

a syndicate performs these processes in order to furnish a mold, mat, or matrix to the newspaper from which the newspaper in turn reproduces or "prints" the comics. The syndicate also supplies the newspaper with a page proof of the comics for comparison and checking purposes.

The legal relation that exists between a syndicate and a newspaper, relative to the use of the literary or artistic material supplied by the former, is generally that of licensor and licensee. The syndicate licenses the newspaper to publish the material (usually only once in the designated newspaper), but such publication may not antedate the so-called release date for the material that appears on the mat and page proof. The release date fixes the date of first newspaper publication. One reason for the release date's importance is to effect simultaneous publication in all of the newspapers to which the material is distributed.

The prevailing practice, as I understand it, is to place the copyright notice for each syndicated item directly on the mat and page proof that are sent to the newspapers. Generally, the syndicate is the author or proprietor of the material and, with propriety, the notice will be in its name. The license agreements with the newspapers usually provide that the notice is to be carried on all copies published in the newspapers. The preservation of the notice on all such copies, or at least the duty of such preservation, is of such overriding significance that our client's licenses in effect provide that the newspapers' right to publish is conditioned upon the carrying of the prescribed notice, to prevent forfeiture of copyright.⁶¹

Not infrequently a syndicate may, prior to newspaper publication, effect the outright sale of a few copies or even of one copy of its syndicable material which it has bound together in page-proof form. Such sale or other first publication is solely for copyright purposes and will secure copyright to the material if due notice is properly affixed.⁶² When that has been done, newspaper publication becomes a mere republication, and the numerous features which have been so bound together need not be separately deposited or claim thereto separately registered as copyrighted contributions to newspapers, in spite of specific copyright notices on the features as they appear in newspapers.⁶³

That comics have an appreciable pecuniary value apart from exploitation in newspapers is shown by the case of *King Features Syndicate v. Fleischer*⁶⁴ which involved the unlicensed and therefore infringing, substantial reproduction in three-dimensional form of the cartoon character "Spark Plug" or "Sparky." When a newspaper comic-strip character is reproduced three-dimensionally under a license, what notice of copyright

⁶¹ American Press Assn. v. Daily Story Publishing Co., 120 F. 766; National Comics Publications v. Fawcett Publications, 191 F. 2d 594, 600.

⁶² King Features Syndicate Inc. v. Bouve, 48 U.S.P.Q. 237.

⁶³ King Features, etc. v. Bouve, 48 U.S.P.Q. 237.

⁶⁴ 299 F. 533.

is required upon the reproduction to prevent a forfeiture of the copyright to the original? Incident to the answering of that question we must first ask: Is such reproduction *per se* entitled to copyright as a reproduction of a work of art or is it a new work entitled to its own copyright as such? I do not believe that a comic strip is a work of art in the sense that reproductions thereof (or of parts thereof) may be separately copyrighted under section 5 of the Act. Moreover, and speaking generally, I submit that the three-dimensional reproduction will be "too trivial" a variant of the original to support a new copyright as a new work. My own view is that the three-dimensional reproduction is, for copyright purposes, a mere copy of the original and should, therefore, carry the same copyright notice as the original. Assuredly when that is done, the original will not be adversely affected. I am prepared, however, to admit that such recommendation may stem from an overabundance of caution.

Another problem that has engaged the attention of syndicate lawyers is this: Is a comic strip a literary work or a mere pictorial illustration, for the purpose of the form of copyright notice that must needs be attached to copies? It has been my opinion that such strips, in view of the description, dialogue or verbal continuity found in them, are more in the nature of literary works than purely pictorial items. I realize, of course, that the verbal matter may be of relatively little significance since we are dealing here with a variant of the age-old form of picture writing. Nevertheless, that is not always so and we know that "literary" in a copyright sense is a far cry from literature. Moreover, the implication of the "Betty Boop"⁶⁵ case appears to be that, had there been story or continuity, the cartoons would have become literary works. However that may be, the *National Comics Publications* case holds that each strip of a comic-strip series, notwithstanding its verbal legend or "balloon," is a pictorial illustration and therefore due copyright notice for it may omit the year date and consist of the copyright symbol "C" enclosed within a circle as provided by section 19 for works under section 5 (f-h). If these comic strips are not literary work, it would seem that they are not protected against delivery, reading or presenting in public for profit under the precise wording of the recent amendment of section 1 (c) of the Act.

In conclusion I should like to consider the question of quotational use of a copyrighted work. How much of such a work may be *fairly* quoted? The basis of fair use in this context is the consent which the law implies from the publication of the work. To what extent one may copy the exact words of a part of a copyrighted work will depend upon various factors, such as the nature and purpose of a copyrighted work, the quality and value of the copied part in relation not only to the copyrighted work but also to the work in which it is used, and the purpose for which it is used. To put it another way, fair use is such use of a copyrighted work

⁶⁵ *Fleischer Studios, Inc. v. Freundlich*,
73 F. 2d 276.

that may be made with impunity because it is reasonable under the particular circumstances of the case. In this area, the answer turns so completely upon the factual complexion of the particular case that rarely will one find what Judge Cardozo once so aptly called "the buried treasure of the law books," that is, the all-fours precedent.

Clearly, overt use of another's work, evidenced by quotation marks, and even acknowledgment of authorship, will not necessarily exonerate.⁶⁶ In fact, where the works are directly competitive, quotation and acknowledgment may have no "exculpatory virtue" because of the false implication of the copyrightee's consent.

Since copyrighted (that is, published) works are subject to comment and criticism, language may be quoted from them by commentators or critics "so far as to make" their "comments" or criticisms "intelligible," as was said in the *Ginn* case.⁶⁷ In other words, to the extent necessary for fair, though not necessarily favorable, criticism, comment or review (and such includes parody) of a work, one may properly quote certain parts of it, provided, of course, so much has not been taken as "will materially reduce the demand for the original."⁶⁸

Apart from criticism, comment or review, there is a line of cases holding that only fair or reasonable use has been made of a copyrighted work in the following situations: (1) the mere background and fragmentary quoting of snatches of substantial parts of a chorus of a song in an unrelated magazine story,⁶⁹ and (2) the incidental quoting, not of snatches, but of an entire lyric chorus of a song in an essentially factual magazine article when there is a real and not too tenuous relation between the song and article in terms of subject matter.⁷⁰ In the last referred-to cases, neither the magazine story nor the article competed with the copyrighted songs; consequently, larger quotational liberty was allowed. Moreover, when the works are noncompetitive, acknowledgment of authorship is a factor making for the fairness of the use.⁷¹

However, if the use that is made of even a small portion of another's copyrighted work is for a selfish commercial purpose, it will not be considered fair, notwithstanding acknowledgment of authorship and absence of competition.⁷²

We have somewhat sketchily touched upon only one facet of the fair-use field: the one dealing with open copying in the form of quotations. In this field a flexible *ad hoc* approach is desirable so that in fixing the dividing line between the permissible and the impermissible we may be sure not "to imperil more than we protect."

⁶⁶ *Chicago Record-Herald v. Tribune Assn.*, 275 F. 797.

⁶⁷ *Ginn v. Apollo Publishing Co.*, 215 F. 772, 778.

⁶⁸ *Hill v. Whalen & Martell*, 220 F. 359.

⁶⁹ *Shapiro Bernstein & Co. v. Collier*, 26 U.S.P.Q. 40.

⁷⁰ *Broadway Music Corp. v. F-R Publishing Co.*, 31 Fed. Supp. 817; *Karil v. Curtis Publishing Co.*, 39 Fed. Supp. 836.

⁷¹ *Karil v. Curtis Publishing Co.*, 39 Fed. Supp. 836.

⁷² *Henry Holt & Co. v. Liggett & Meyers*, 23 Fed. Supp. 302; *New York Tribune Inc. v. Otis & Co.*, 39 Fed. Supp. 67.